to increase in proportion to their proximity to the Convention in 1787." *Powell v. McCormack*, 395 U.S. 486, 547 (1969). In the case of treaties, the consistent precedents of this Court in the initial decades of the Constitution demonstrate with clarity the contemporaneous understanding that it is the judiciary's responsibility to provide remedies for individuals who are harmed by violations of their treaty-based primary rights. Moreover, in cases where a court has jurisdiction, the court does not need express authorization from the political branches – either in the form of a federal statutory right of action, or in the form of an express private right of action in the treaty – to provide judicial remedies for violations of individual treaty rights, because it is the judiciary's responsibility within our system of divided government to supply the remedy for violations of treaty-based primary rights.

For ease of analysis, Part One divides the 34 treaty cases decided by the Supreme Court between 1789 and 1829 into four groups: twelve cases where the plaintiff invoked a treaty and prevailed on the basis of the treaty; six cases where the defendant invoked a treaty and prevailed on the basis of the treaty; ten cases where the party invoking the treaty lost on the merits of the treaty claim; and six cases that do not fit into any of the other categories.

A. This Court Regularly Granted Remedies to Plaintiffs in Cases Where the Treaty at Issue Did Not Create a Private Right of Action

Between 1789 and 1829, this Court decided twelve cases in which an individual plaintiff secured a remedy for a violation of a treaty-based primary right. In two of those cases, the treaty at issue granted the plaintiff a private right of action. *See The Bello Corrunes*, 19 U.S. 152 (1821)

(restoring ship and cargo to Spanish shipowners because ship was captured in violation of bilateral treaty between U.S. and Spain); *The Pizarro*, 15 U.S. 227 (1817) (awarding restitution to Spanish claimants because ship was seized in violation of bilateral treaty between U.S. and Spain).[3]

In the other ten cases, though, the plaintiff brought suit on the basis of a domestic right of action, and the treaty provided a primary rule for deciding the merits of the claim. *See Hughes v. Edwards*, 22 U.S. 489 (1824) (suit to foreclose on mortgage); *Soc'y for Propagation of Gospel v. New Haven*, 21 U.S. 464 (1823) (action for ejectment); *Craig v. Radford*, 16 U.S. 594 (1818) (equitable action to divide a tract of land); *Chirac v. Lessee of Chirac*, 15 U.S. 259 (1817) (action for ejectment); *Fitzsimmons v. Newport Ins. Co.*, 8 U.S. 185 (1808) (suit for breach of contract); *Higginson v. Mein*, 8 U.S. 415 (1808) (suit to foreclose on mortgage); *Hopkirk v. Bell*, 7 U.S. 454 (1806) (suit to recover payment on bond); *Ogden v. Blackledge*, 6 U.S. 272 (1804) (suit to recover payment on bond); *United States v. The Schooner Peggy*, 5 U.S. 103 (1801) (libel in admiralty court); *Ware v. Hylton*, 3 U.S. 199 (1796) (suit to recover payment on bond). These cases are analogous to *Bustillo v. Johnson*, because Mr. Bustillo brought suit on the basis of Virginia's habeas

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[3] In both *Bello Corrunes* and *Pizarro*, the Spanish claimants had an express private right of action under the Treaty of Friendship, Limits and Navigation, Oct. 27, 1795, art. 20, U.S.-Spain, *reprinted in* 2 Treaties and Other International Acts of the United States of America 318, 334-35 (Hunter Miller ed., 1931) [hereinafter, "1795 Treaty with Spain"] ("It is also agreed that the inhabitants of the territories of each party shall respectively have free access to the Courts of Justice of the other, and they shall be permitted to prosecute suits for the recovery of their properties . . . and for obtaining satisfaction for the damages which they may have sustained . . . ").

statute, and the VCCR provides a primary rule for deciding the merits of his claim.

In each of the ten cases cited above, where the plaintiff brought suit on the basis of a domestic right of action, the Court applied the relevant treaty provision as a rule of decision in the case, despite the fact that the treaty at issue did not create a private right of action. In none of these ten cases did the treaty expressly empower the plaintiff to invoke the treaty before a domestic court. Nevertheless, in each case the Court awarded the plaintiff a remedy because he had been harmed by a past violation of a primary treaty right, or was likely to be harmed by a future violation of a primary treaty right. *See Hughes*, 22 U.S. 489 (ordering foreclosure and sale of mortgaged property to secure individual property right protected by article 9 of Treaty of Amity, Commerce, and Navigation, Nov. 19, 1794, art. 9, U.S.-Great Britain, *reprinted in* 2 Treaties and Other International Acts of the United States of America, 245, 253-54 (Hunter Miller ed., 1931) [hereinafter, "Jay Treaty"]; *Soc'y for Propagation of Gospel*, 21 U.S. 464 (ordering restoration to plaintiff of land that had been wrongfully expropriated by state legislative act in violation of article 6 of the Definitive Treaty of Peace, Sept. 3, 1783, art. 6, U.S.-Great Britain, *reprinted in* 2 Treaties and Other International Acts of the United States of America, 151, 155 (Hunter Miller ed., 1931)); *Craig*, 16 U.S. 594 (ordering defendants to convey land to plaintiff because defendants had wrongfully appropriated land in violation of article 9 of Jay Treaty); *Chirac*, 15 U.S. 259 (invalidating Maryland law and restoring property rights of French plaintiffs because state had wrongfully terminated those rights in violation of article 7 of the Convention Between the French Republic and the United States of America, Sept. 30, 1800, art. 7, U.S.-France, *reprinted in* 2 Treaties and Other International Acts of the United States of America, 457, 462-63 (Hunter Miller ed.,

1931) [hereinafter, "1800 Convention"]; *Fitzsimmons*, 8 U.S. 185 (ordering insurance company to make contractual payment to insured because British prize court had wrongfully condemned the insured ship, in violation of article 18 of Jay Treaty); *Higginson*, 8 U.S. 415 (ordering debtor to pay debt wrongfully withheld from creditor in violation of article 5 of the Definitive Treaty of Peace); *Hopkirk*, 7 U.S. 454 (ordering debtor to pay debt wrongfully withheld from creditor in violation of article 4 of the Definitive Treaty of Peace); *Ogden*, 6 U.S. 272 (ordering debtor to pay debt wrongfully withheld from creditor in violation of article 4 of the Definitive Treaty of Peace); *The Schooner Peggy*, 5 U.S. 103 (ordering restoration of ship to French owner, as required by article 4 of the 1800 Convention); *Ware*, 3 U.S. 199 (ordering debtor to pay debt wrongfully withheld from creditor in violation of article 4 of the Definitive Treaty of Peace).

In sum, this Court's decisions during this period support a strong presumption that an individual who was harmed by a past violation of his treaty-based primary rights, or is likely to be harmed by a future violation of those rights, is entitled to a judicial remedy, even if the treaty at issue does not create a private right of action or expressly empower the individual to invoke the treaty before a domestic court.

B. This Court Regularly Awarded Judgment for Defendants in Cases Where the Treaty Did Not Expressly Empower Individuals to Invoke the Treaty

Between 1789 and 1829, this Court decided six cases in which an individual defendant secured a judgment to protect a primary treaty right. In each of these six cases, the Court applied the relevant treaty provision as a rule of decision, despite the fact that the treaty at issue did not expressly empower the defendant to invoke the treaty before

a domestic court. In each of the six cases, the rationale supporting judgment for the defendant relied, at least in part, on the Court's assessment that a judgment for the plaintiff would have infringed upon the defendant's treaty-based primary rights. *See Carneal v. Banks*, 23 U.S. 181 (1825) (where plaintiff sued to rescind contract for land swap, claiming that defendant did not have valid title to land, Court dismissed bill for rescission because defendant derived title from French citizen whose right to hold land in U.S. territory was protected under article 11 of Treaty of Amity and Commerce, Feb. 6, 1778, art. 11, U.S.-France, *reprinted in* 2 Treaties and Other International Acts of the United States of America, 3, 11-12 (Hunter Miller ed., 1931) [hereinafter "1778 Treaty with France"); *Orr v. Hodgson*, 17 U.S. 453 (1819) (where plaintiff sued to rescind contract for purchase of land, challenging validity of defendant's title, Court dismissed bill for rescission because defendant had valid title protected by article 6 of Definitive Treaty of Peace and article 9 of Jay Treaty); *Jackson v. Clarke*, 16 U.S. 1 (1818) (where plaintiff sued for ejectment, Court dismissed suit because article 9 of Jay Treaty protected rights of British citizens to hold and inherit land); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. 603 (1813) (where plaintiff sued for ejectment, Court dismissed suit because defendant's title to land was secured by article 9 of Jay Treaty); *Moodie v. The Ship Phoebe Anne*, 3 U.S. 319 (1796) (where British consul filed libel to recover ship captured by French privateer, Court awarded judgment to French privateer because article 19 of 1778 Treaty with France protected right of French citizens to enter U.S. ports and obtain items necessary for repairs); *Georgia v. Brailsford*, 3 U.S. 1 (1794) (where State of Georgia brought suit, asserting entitlement to pre-war debt owed to British citizen, Court held that article 4 of Definitive Treaty of Peace protected British defendant's right to recover debt).

In none of these cases did the treaty at issue expressly empower the defendant to invoke the treaty as a defense in a judicial proceeding. The absence of any such treaty provision, however, did not preclude individual enforcement of the treaty. To the contrary, the Court applied the presumption that an individual defendant who has been harmed by a violation of his primary treaty rights, or is likely to be harmed by a future violation of those rights, has the capacity to invoke the treaty and is entitled to a judicial remedy. Since Mr. Sanchez-Llamas is also a defendant in a judicial proceeding, like the defendants in the cases cited above, he has the capacity to invoke the VCCR as a defense, and he is entitled to a judicial remedy, if he was harmed by a violation of his treaty-based primary rights.

C. The Cases Where Treaty Claimants Lost Are Consistent with the Presumption in Favor of Judicial Remedies for Violations of Individual Treaty Rights

Of the 34 treaty cases decided by this Court between 1789 and 1829, there were ten cases where the party invoking the treaty lost on the merits. In none of those cases, however, did the Court rule that the treaty was not judicially enforceable. Rather, in each case, the party invoking the treaty lost on the merits, either because the treaty did not grant that party the primary right he asserted, or because there was no violation of that right. *See Foster v. Neilson*, 27 U.S. 253 (1829) (where plaintiffs claimed title to land on the basis of article 8 of Treaty of Amity, Settlement, and Limits, Feb. 22, 1819, U.S.-Spain, *reprinted in* 3 Treaties and Other International Acts of the United States of America, 3, 9 (Hunter Miller ed., 1933) [hereinafter "Florida Treaty"], Court held that treaty did not grant plaintiffs title to disputed property); *Comegys v. Vasse*, 26 U.S. 193 (1828) (where arbitral commission established pursuant to Florida Treaty

awarded money judgment to creditors of bankrupt person, treaty did not grant bankrupt party right to recover judgment from creditors); *De la Croix v. Chamberlain*, 25 U.S. 599 (1827) (Florida Treaty protected plaintiff's inchoate title to land, but inchoate title was insufficient to permit plaintiff to recover land in action for ejectment); *Blight's Lessee v. Rochester*, 20 U.S. 535 (1822) (plaintiffs, who claimed title to land by descent from British citizen, lost on merits because title of British citizen was not protected by Jay Treaty or by Definitive Treaty of Peace); *The Amiable Isabella*, 19 U.S. 1 (1821) (Spanish claimant, who invoked article 17 of 1795 Treaty with Spain, lost on merits because treaty did not grant him the immunity he claimed); *The Nuestra Senora de la Caridad*, 17 U.S. 497 (1819) (Spanish shipowner, who invoked 1795 Treaty with Spain, lost on merits because treaty did not protect goods from capture); *The Nereide*, 13 U.S. 388 (1815) (American privateer, who invoked article 15 of 1795 Treaty with Spain, lost on merits because law of nations protected cargo from capture and treaty did not alter law of nations in that respect); *Smith v. Maryland*, 10 U.S. 286 (1810) (defendant, who invoked article 6 of Definitive Treaty of Peace, lost on merits because treaty provision protecting land from confiscation did not apply to subject property); *M'Ilvaine v. Coxe's Lessee*, 8 U.S. 209 (1808) (where defendant asserted that Definitive Treaty of Peace deprived plaintiff of property rights, Court rejected argument on merits and affirmed plaintiff's title to land); *Glass v. The Sloop Betsey*, 3 U.S. 6 (1794) (where French privateer contended that article 17 of 1778 Treaty with France barred District Court's exercise of jurisdiction in prize case, Court ruled that treaty did not deprive District Court of jurisdiction, and remanded case for adjudication on merits).

In sum, none of these cases support a presumption against individual enforcement of treaties. To the contrary, the cases merely support the unremarkable proposition that

an individual whose primary rights are not protected by a treaty cannot obtain a remedy on the basis of that treaty.

D. Other Cases From This Period Are Consistent with the Presumption in Favor of Judicial Remedies for Violations of Individual Treaty Rights

In addition to the cases discussed above, this Court decided six other cases between 1789 and 1829 in which an individual litigant raised a claim or defense on the basis of a treaty. In two of those cases, the Court did not rule on the merits of the treaty claim. *See Harden v. Fisher*, 14 U.S. 300 (1816) (remanding case to circuit court for additional factfinding); *United States v. Lawrence*, 3 U.S. 42 (1795) (dismissing mandamus petition directed against a federal judge because the judge acted within the scope of his discretionary authority). In two other cases, the Court did not apply the treaty as a rule of decision, but merely consulted the treaty as an aid to construing some other provision of law, which provided the rule of decision in the case. *See Henderson v. Poindexter's Lessee*, 25 U.S. 530 (1827) (prevailing plaintiff, whose title to land did not depend on treaty, invoked Definitive Treaty of Peace and 1795 Treaty with Spain to establish that defendant's land grant from Spanish government was void because land was part of United States at time of Spanish grant); *Harcourt v. Gaillard*, 25 U.S. 523 (1827) (prevailing defendant, whose title to land did not depend on treaty, invoked Definitive Treaty of Peace to establish that plaintiff's grant from British governor was void because land was part of United States at time of British grant). In one case, each of the opposing parties invoked a different treaty in support of its case. *See Talbot v. Janson*, 3 U.S. 133 (1795) (rejecting captor's argument that treaty between U.S. and France deprived District Court of jurisdiction, and ruling in favor of Dutch shipowner on the

basis of a treaty between U.S. and Netherlands). These five cases neither support nor refute the presumption in favor of judicial remedies for violations of individual treaty rights.

The only other treaty case during this period was *Owings v. Norwood's Lessee*, 9 U.S. 344 (1809), which involved a dispute related to land in Maryland. The original owner of the land mortgaged the property to Scarth, a British citizen. In 1732, Waters obtained a judgment of condemnation against the land for a debt due to him from Scarth, but Waters never executed the judgment. *Id.* at 344. Owings, a Maryland citizen, derived his claim to the land from Waters. In 1780, Maryland confiscated all property in the state belonging to British subjects. *Id.* at 346. The plaintiff had a patent from the State of Maryland, issued in 1800. *Id.* at 344. Plaintiff sued to eject Owings. In response, Owings invoked article 5 of the Definitive Treaty of Peace, which protected the rights of British citizens whose property was confiscated during the Revolutionary War. The Court's central holding was that it lacked jurisdiction because the case did not "arise under" a treaty. *Id.* at 347-48.

The case did not arise under a treaty because Owings, who invoked the treaty, did not have any property rights protected by the treaty. In contrast, Scarth's heirs, who were British citizens, did have property rights protected by the treaty, because Scarth's mortgage was confiscated during the war. Thus, "if Scarth or his heirs had claimed, it would have been a case arising under a treaty," because Scarth's mortgage was protected from confiscation by article 5 of the treaty. *Id.* at 348. In sum, *Owings* anticipates the modern rule that individuals lack standing to enforce the rights of unrelated third parties. Owings could not assert Scarth's treaty rights because he was not Scarth's heir or successor-in-interest. But Justice Marshall left no doubt that Scarth's heirs could have invoked the Definitive Treaty of Peace,

despite the fact that the treaty itself did not expressly grant them the power to invoke the treaty as a defense in an action for ejectment.

E. *Foster* is Consistent with the Presumption in Favor of Judicial Remedies for Violations of Individual Treaty Rights

The Oregon Supreme Court cited *Foster v. Neilson*, 27 U.S. 253 (1829) in support of the proposition that there is "a presumption against the creation of individual, judicially enforceable rights" by means of treaties. *State v. Sanchez-Llamas*, 108 P.3d 573 (Or. 2005). In fact, *Foster* is entirely consistent with the approach reflected in the other treaty cases decided by the Supreme Court during this period, which applied a strong presumption in favor of judicial remedies for violations of individual treaty rights.

Foster involved a dispute over title to land in Louisiana. The land at issue was part of a large area that was the subject of a political dispute between the United States and Spain between 1803, when the United States acquired Louisiana from France, and 1819, when the U.S. purchased Florida from Spain. *See Foster*, 27 U.S. at 300-310. During that period, Spain asserted that the land east of the Mississippi river and south of thirty-one degrees latitude was a part of Florida, which belonged to Spain. The United States, in contrast, asserted that the disputed territory was part of Louisiana, which the U.S. had acquired from France. The plaintiffs in *Foster* traced their title to an 1804 land grant from the Spanish governor of Florida. *See id.* at 253-55. The Court in *Foster* held that the plaintiffs could not establish a valid title on the basis of the 1804 Spanish grant because the United States had acquired the land when it purchased Louisiana in 1803, and the Spanish governor had no authority to grant land in U.S. territory. *Id.* at 307-09.

That, however, was not the end of the matter. The Court next considered whether the plaintiffs could establish a valid title on the basis of article 8 of the Florida Treaty. *See id.* at 310-15. Article 8 stipulated that land grants made before 1818 by the Spanish government in the "Territories ceded by His Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands." Florida Treaty, *supra*, art. 8. The Justices could not agree among themselves whether the disputed territory east of the Mississippi River and south of 31 degrees latitude was included within the terms of Article 8. *See Foster*, 27 U.S. at 313. Marshall, accordingly, devised a solution that enabled the Court to sidestep this disagreement. The Court held that even if Article 8 did apply to the land at issue, the treaty itself did not secure the property rights of individual recipients of Spanish land grants because the specific words of Article 8 – "shall be ratified and confirmed" – merely promised future legislative action by the U.S. government to ratify and confirm the prior Spanish land grants. *See id.* at 314. This holding later became the basis of the modern doctrine of non-self-executing treaties. Pursuant to this holding, the Court awarded judgment to the defendants. The rationale, though, was not that the treaty was not enforceable by private individuals. Rather, the rationale was that the plaintiffs did not have valid title to the land because the initial land grant from the Spanish governor was void, and the U.S. promise of future legislative action to ratify and confirm that grant was never executed.

In sum, between 1789 and 1829 there was not a single case in which this Court denied a remedy to an individual whose treaty-based primary rights had been violated. There were, however, 16 cases where an individual litigant obtained a remedy for a treaty violation, despite the fact that the treaty at issue did not create a private right of action and did not expressly empower individuals to invoke the treaty before a

domestic court. Thus, the assertion that treaties are not enforceable by private parties unless the treaty itself creates a private right of action -- which has been endorsed by several state courts and lower federal courts in recent cases involving the VCCR -- is squarely at odds with the Framers' original understanding of the judiciary's role in treaty enforcement.

II. MORE RECENT DECISIONS BY THIS COURT ALSO SUPPORT A STRONG PRESUMPTION IN FAVOR OF JUDICIAL REMEDIES FOR VIOLATIONS OF INDIVIDUAL TREATY RIGHTS

A. This Court Continues to Grant Individual Remedies in Cases Where the Treaty at Issue Does Not Create a Private Right of Action

The presumption in favor of judicial remedies for violations of individual treaty rights is not merely a relic of the past. This Court continued to apply that presumption throughout the nineteenth and twentieth centuries, and even into the twenty-first century. Four cases from three different centuries illustrate this point.

In *United States v. Rauscher*, 119 U.S. 407 (1886), the appellee challenged his criminal conviction on the ground that it violated Article X of the Webster-Ashburton Treaty, Aug. 9, 1842, art. X, U.S.-Great Britain, *reprinted in* 4 Treaties and Other International Acts of the United States of America, 363, 369-70 (Hunter Miller ed., 1934). The treaty did not expressly empower Rauscher to invoke Article X as a defense to criminal charges. Nevertheless, this Court ruled in favor of Rauscher on the basis of his treaty defense, holding that he had "a right to be exempt from prosecution upon the charge set forth in the indictment." *Rauscher*, 119 U.S. at

409. *Rauscher* is especially relevant to *Sanchez-Llamas*, because it demonstrates that a criminal defendant who has been harmed by a violation of his treaty rights has the power to invoke that treaty as a defense to criminal prosecution, even if the treaty is silent with respect to domestic judicial remedies.

In *Chew Heong v. United States*, 112 U.S. 536 (1884), a Chinese laborer who was detained on a ship near San Francisco filed a habeas corpus petition in federal court to obtain release from custody. *Id.* at 538. Chew Heong alleged that his detention violated Article II of an 1880 treaty between the United States and China, which stated: "Chinese laborers who are now in the United States shall be allowed to go and come of their own free will." Treaty Concerning Immigration, Nov. 17, 1880, U.S.-China, 22 Stat. 826. The treaty itself did not grant Chew Heong a right of access to U.S. court, nor did it expressly grant him the power to invoke the treaty before a U.S. court. Even so, the Supreme Court granted Chew Heong's habeas petition, holding that he was "entitled to enter and remain in the United States." *Chew Heong*, 112 U.S. at 560. In short, the treaty was judicially enforceable because the treaty created a primary individual right and the federal habeas statute provided a private right of action that enabled him to enforce that primary right. *Chew Heong* is especially relevant to *Bustillo*, because it demonstrates that a petitioner can bring a habeas corpus action to enforce his treaty rights, even if the treaty at issue does not create a private right of action.

The pattern of treaty enforcement described above, which combines treaty-based primary rights with domestic rights of action, continued into the twentieth century. In *Asakura v. Seattle*, 265 U.S. 332 (1924), the plaintiff was a Japanese national who operated a pawnbroker business in Seattle. *Id.* at 339. Seattle passed an ordinance that

prohibited non-U.S.-citizens from operating a pawnbroker business in the city. *Id.* at 339-40. Plaintiff sued to enjoin enforcement of the ordinance on the grounds that it violated a bilateral treaty with Japan. Treaty of Commerce and Navigation, Feb. 21, 1911, U.S.-Japan, 37 Stat. 1504. The treaty granted Japanese citizens a primary right "to carry on trade" in the United States "upon the same terms as native citizens or subjects." *Id.*, Art. I. However, the treaty did not expressly grant Japanese citizens a right to sue for injunctive relief. Nevertheless, the Supreme Court affirmed an injunction in favor of the plaintiff, relying on the traditional equitable action for injunctive relief as the basis of a domestic right of action to enforce the plaintiff's treaty-based primary rights.

Just three terms ago, in *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), this Court upheld a judicial remedy for a private plaintiff who sued to enforce international agreements that did not themselves create a private right of action. In *Garamendi*, a trade association sued in federal court to enjoin enforcement of a California statute that required insurance companies to disclose information about "insurance policies issued to persons in Europe, which were in effect between 1920 and 1945." *Id.* at 409. The Court held that certain bilateral agreements between the United States and European governments preempted the California law.[4] *Id.* at 420-27. The bilateral agreements manifest the

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[4] The Court's preemption analysis relies primarily on three bilateral executive agreements: Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," July 17, 2000, U.S.-F.R.G, 39 I.L.M. 1298 [hereinafter, "U.S.-Germany Agreement"]; Agreement Concerning the Austrian Fund "Reconciliation, Peace and Cooperation," October 24, 2000, U.S.-Aus., 40 I.L.M. 523; Agreement Concerning Payments for Certain Losses Suffered During World War II, January 18, 2001, U.S.-Fr., Temp. State Dep't No. 01-36.

drafters' expectations that the federal government might invoke the agreements in support of motions to dismiss private lawsuits. *See* U.S.-Germany Agreement, art. 2, para. 1 ("The United States shall, in all cases in which the United States is notified that a claim described in article 1(1) has been asserted in a court in the United States, inform its courts . . . that dismissal of such cases would be in its foreign policy interest."). In *Garamendi*, though, the insurance companies invoked the bilateral agreements offensively in support of a suit against the state Insurance Commissioner to enjoin enforcement of a California statute. *See Garamendi*, 539 U.S. at 412. There is no language in any of the agreements indicating that the drafters intended to authorize this type of private lawsuit. Even so, the Court granted relief to plaintiffs on the grounds that the agreements preempted California law under the Supremacy Clause. *Id.* at 427-29. Thus, the Court in *Garamendi* tacitly relied on the Supremacy Clause as a basis for a private right of action to enforce international agreements that did not provide plaintiffs a right to sue in U.S. courts.[5]

In sum, the claim that treaties are not judicially enforceable by private parties unless the treaty itself creates a private right of action is refuted by two centuries of jurisprudence in which this Court has consistently approved remedies for individuals whose treaty rights were violated.

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[5] There are numerous cases decided in the past two decades in which the Supreme Court has tacitly relied on the Supremacy Clause as a basis for a private right of action to enjoin enforcement of state laws that are preempted by federal statutes. *See* David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L. REV. 355, 390-401 (2004) (analyzing cases). *Garamendi* differs from those cases in that the preemptive federal laws are international agreements, not federal statutes. Even so, the private right of action analysis is identical.

despite the fact that the treaty at issue did not create a private right of action. The approach that this Court has actually applied, which in practice amounts to a strong presumption in favor of judicial remedies for individuals whose treaty rights are violated, promotes U.S. compliance with its treaty obligations, and thereby helps avoid the international friction that would otherwise result from a breach of U.S. treaty obligations. In this way, the presumption in favor of judicial remedies helps realize the objective that the Framers sought to promote by including treaties in the Supremacy Clause – that is, to avoid situations where treaty violations lead to unwanted international conflicts. *See* Carlos M. Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1110 (1992) ("The Convention and ratification debates, and contemporaneous statements, show clearly that the Framers were concerned about treaty violations because they could provoke wars, deter other nations from entering into beneficial agreements with us, and adversely affect the nation's reputation.")

B. Cases Cited by the Oregon Supreme Court Are Consistent with the Presumption in Favor of Judicial Remedies

The Oregon Supreme Court relied on three U.S. Supreme Court decisions in support of its assertion that there is "a presumption against the creation of individual judicially enforceable rights" by means of treaties. *See State v. Sanchez-Llamas*, 108 P.3d 573, 575-77 (Or. 2005). The three cases are: *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989); *Edye v. Robertson (Head Money Cases)*, 112 U.S. 580 (1884); and *Foster v. Neilson*, 27 U.S. 253 (1829). For the reasons noted above, *Foster* is consistent with a presumption in favor of judicial remedies for violations of individual treaty rights. *See supra* Part I.E.

In *Amerada Hess*, the plaintiff was not even raising a claim under a treaty. The plaintiff, a shipping company, alleged that Argentina had violated its right to engage in neutral shipping operations, which is protected under customary international law. *Amerada Hess*, 488 U.S. at 432. The Court rejected the claim on sovereign immunity grounds. *See id.* at 439-41. The plaintiff in *Amerada Hess* did invoke two treaties in support of its argument that the defendant, Argentina, had waived the sovereign immunity to which it might otherwise be entitled under the Foreign Sovereign Immunities Act. *See Amerada Hess*, 488 U.S. at 441-43. The Court, however, held that the subject treaties did not contain a waiver of sovereign immunity. *Id.* The Court mentioned in passing that the treaties "do not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts." *Id.* at 442. Given that the plaintiff did not base its right of action on a treaty, this statement is best read as an affirmation that the treaties cited did not waive the defendant's sovereign immunity because they did not specify that private parties could bring suit in U.S. courts to recover damages from foreign states.

Amerada Hess at most suggests that a defendant can overcome the presumption in favor of judicial remedies for violations of individual treaty rights by successfully raising a sovereign immunity defense. Neither respondent in the present case, though, is entitled to sovereign immunity. The State of Oregon cannot claim immunity because it is in the position of prosecutor in the *Sanchez-Llamas* case. And the State of Virginia cannot claim immunity because sovereign immunity is not a valid defense to a habeas corpus petition. *See* Larry W. Yackle, Federal Courts 313 (1999). Thus, *Amerada Hess* provides no support for respondents in this case.

Head Money Cases, 112 U.S. 580 (1884), also cited by the Oregon Supreme Court, actually supports a presumption *in favor of* judicial remedies for violations of individual treaty rights. In *Head Money Cases*, this Court drew a critical distinction between treaties that are "primarily a compact between independent nations," and treaties that "contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other." *Id.* at 598. In short, there is an important distinction between treaties that create primary rights for individuals and treaties that do not create such rights. If a treaty does not create primary rights for individuals, "its infraction becomes the subject of international negotiations and reclamations . . . . It is obvious that with all this the judicial courts have nothing to do and can give no redress." *Id.* at 598. If, however, a treaty prescribes "a rule by which the rights of the private citizen or subject may be determined . . . [the] court resorts to the treaty for a rule of decision for the case before it as it would to a statute." *Id.*, at 598-99. In light of the cases discussed above, it is evident that the Court's reference to rules "by which the rights of the private citizen . . . . may be determined" is a reference to primary rights, not private rights of action. Thus, *Head Money Cases* stands for the proposition that courts should enforce treaties on behalf of private individuals whenever the treaty prescribes a primary rule governing the rights of private individuals – that is, whenever the treaty protects primary individual rights.

III. INDIVIDUALS WHO ARE HARMED BY VIOLATIONS OF PRIMARY RIGHTS PROTECTED BY THE VCCR ARE ENTITLED TO JUDICIAL REMEDIES

For the reasons explained above, if a particular treaty provision is the Law of the Land under the Supremacy Clause, and it protects primary individual rights, then individuals who are harmed by a violation of their treaty-based primary rights are entitled to domestic judicial remedies, unless Congress has enacted legislation to preclude such remedies. There is no dispute that the VCCR is the Law of the Land. Although congressional amendments to the federal habeas statute may bar federal habeas review of some Vienna Convention claims, Congress has not enacted legislation to preclude state court remedies for violations of the VCCR. Therefore, individuals harmed by violations of their rights under Article 36 are entitled to judicial remedies in state courts.

A. Article 36 of the VCCR Protects Primary Individual Rights

For the purpose of this brief, an individual has a "primary right" under a treaty if a state party to the treaty has a legal duty under the treaty to behave in a particular way, or to refrain from behaving in a particular way, with respect to that individual. The question whether a state party has such a duty is a question of treaty interpretation. Courts look to the plain meaning of the text to determine the correct interpretation of a treaty. *See Geofroy v. Riggs*, 133 U.S. 258, 271 (1890). It is clear from the plain meaning of the treaty text that Article 36(1) of the VCCR grants primary rights to individuals. A foreign national arrested in the United States has a primary right "to communicate with and [have] access to consular officers of the sending State."

VCCR, art. 36, para. 1(a). The arrested foreign national also has a primary right to request that U.S. authorities "inform the consular post of the sending State" that he has been arrested, and U.S. authorities have a legal duty to honor such requests. VCCR, art. 36, para. 1(b). Moreover, the foreign national has a primary right to be informed "without delay" of his right of access to consular officers. *Id.* It is difficult to imagine how anyone could conclude, on the basis of this text, that Article 36 does not grant primary rights to individuals. The text of Article 36 is sufficiently clear that it is not necessary to resort to any supplementary means of treaty interpretation.

There is no doubt that petitioners' individual rights under Article 36 were violated. In *Sanchez-Llamas*, the Oregon Supreme Court admitted that "[t]he police did not inform defendant at that time, or at any time thereafter, that he had any right under Article 36 of the VCCR to communicate with the Mexican consulate." *Sanchez-Llamas*, 108 P.3d at 574. Since Sanchez-Llamas is a defendant in a criminal proceeding, he does not need to establish a right of access to court. Moreover, in accordance with the controlling Supreme Court precedent discussed above, he has the power to invoke the VCCR in a domestic court if he was harmed by the violation of his treaty rights. Therefore, the only significant question in his case is whether he was harmed, and if so, what is the appropriate remedy.

In *Bustillo*, the United States has conceded that petitioner's Vienna Convention rights were violated. *See Bustillo*, Petition for a Writ of Certiorari, at 3. Virginia's habeas corpus statute granted Mr. Bustillo a right of access to state court to pursue his habeas petition. *See* Va. Code § 8.01-654. Moreover, in accordance with controlling Supreme Court precedent, he had the power to invoke the VCCR in a Virginia court if he was harmed by the violation

of his treaty rights. Nevertheless, the State of Virginia claims that state procedural default rules prevent Mr. Bustillo from raising a VCCR claim in his state habeas petition. The next section of this brief addresses that argument.

B. The State of Virginia May Not Invoke Procedural Default Rules if Doing So Would Contravene U.S. Treaty Obligations

In *Avena and Other Mexican Nationals* (Mexico v. United States), 2004 ICJ 128 [hereinafter, *Avena*], the International Court of Justice held that the United States has an international obligation under Article 36(2) of the VCCR to provide review and reconsideration, *by means of a judicial proceeding*, of the convictions and sentences of individuals whose rights under Article 36(1) of the VCCR have been violated. *See id.* at ¶¶ 138-43. This brief assumes that the ICJ's decision in *Avena* constitutes a correct interpretation of Article 36(2). Given this interpretation, the question arises as to which actor or actors in the domestic legal system have the authority to choose to violate U.S. obligations under Article 36(2). In other words, under the U.S. constitutional system, who has the constitutional authority to decide not to provide the judicial review required by Article 36(2)?

There is no doubt that Congress has the constitutional authority to enact legislation to preclude the type of judicial review required by Article 36(2). Such legislation would be a violation of the United States' international obligations, but it would supersede the treaty for purposes of domestic law. *See* Restatement (Third) of the Foreign Relations Law of the United States § 115(1)(a). State courts, however, unlike Congress, do not have the constitutional authority to decide to violate U.S. treaty obligations. Moreover, if a state court with jurisdiction over a relevant case denies "review and reconsideration" to an individual who has been convicted and

sentenced to severe penalties after having been deprived of his rights under Article 36(1), the court itself commits a violation of Article 36(2). *See Avena*, ¶¶ 138-41. Since courts lack the constitutional authority to choose to violate U.S. treaty obligations, every judicial decision refusing to provide review and reconsideration is a judicial act in excess of that court's constitutional authority, unless that treaty violation has been authorized by Congress.

The present case is readily distinguishable from cases where state procedural default rules bar a state habeas remedy for an individual whose federal constitutional rights were violated. The U.S. Constitution does not contain any provision that prohibits state governments from applying procedural default rules to bar remedies for individuals whose federal constitutional rights were violated. (If the Constitution did contain such a provision, then states could not apply procedural default rules to bar federal constitutional claims.) Article 36(2) of the VCCR, however, does prohibit state governments from applying procedural default rules to bar remedies for individuals whose primary rights under Article 36(1) were violated, at least in cases where those individuals were "convicted and sentenced to severe penalties."[6] Since the VCCR is Law of the Land under the Supremacy Clause, it preempts state procedural rules insofar as application of those rules would contravene U.S. treaty obligations.

The present case is also readily distinguishable from *Breard v. Greene*, 523 U.S. 371 (1998). In *Breard*, this

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[6] In *Breard v. Greene*, 523 U.S. 371 (1998), this Court expressed the view that the VCCR did not preclude application of domestic law procedural default rules. This interpretation of the VCCR, rendered without the benefit of briefing on the merits, has since been rejected by the ICJ. *See Avena*, ¶¶ 138-41.

Court, in denying discretionary relief, expressed the view that petitioner's federal habeas petition alleging violations of the VCCR was barred, *inter alia*, by the Antiterrorism and Effective Death Penalty Act, a federal statute enacted long after the U.S. ratified the VCCR.[7] *See id.* at 376. Under the last-in-time rule, a later-in-time federal statute takes precedence over an earlier-in-time treaty, insofar as there is an unavoidable conflict between the two laws. *See* Restatement (Third) of the Foreign Relations Law of the United States § 115(1)(a). Therefore, if a treaty requires "review and reconsideration," but a later-in-time federal statute precludes federal habeas review, the statute takes precedence over the treaty as a matter of domestic law, insofar as petitioner is seeking federal habeas review. The present case, however, involves the application of a state procedural default rule. If there is an unavoidable conflict between a treaty and a state statute or rule, the treaty always takes precedence over state law because the Supremacy Clause says so. U.S. Const. art. VI, cl. 2. Thus, in contrast to Congress, state legislatures do not have the constitutional power to authorize application of procedural default rules in cases where application of such rules would contravene U.S. treaty obligations.

This construction of the Supremacy Clause promotes the central purpose underlying the Framers' decision to include treaties in the Supremacy Clause. Under the Articles

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[7] This Court also said in *Breard* that Paraguay's claim against the Governor of Virginia was barred by the Eleventh Amendment, *id.* at 377-78, and that Paraguay did not have a private right of action to bring its claim in U.S. courts. *Id.* at 377-78. It is noteworthy, though, that the Court did not say that the Eleventh Amendment barred Breard's individual claim, or that Breard himself lacked a private right of action. This reinforces the point that neither of these objections bars Mr. Bustillo's claim.

of Confederation, states were routinely violating U.S. treaty obligations, and the federal government was powerless to halt those violations. *See* Vazquez, *Treaty-Based Rights*, 92 COLUM. L. REV. at 1101-04. The Framers' solution to this problem, embodied in the Supremacy Clause, was to give treaties the status of federal law, and to make treaties directly binding on judges in state courts. *See id.* at 1104-10. *See also* Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095, 2120-26 (1999). In recent years, state governments have routinely violated U.S. obligations under Article 36(1) of the VCCR, just as state governments violated U.S. treaty obligations before adoption of the Constitution. This court can solve that problem, and halt ongoing violations of Article 36(1), by ruling that state courts may not apply procedural default rules in cases where application of such rules would deprive individual foreigners of the judicial review and reconsideration required by Article 36(2). If this Court fails to issue such a ruling, state officers will continue to violate Article 36(1) of the VCCR, thereby perpetuating the problem that the Supremacy Clause was intended to rectify.

Finally, it bears emphasis that the United States can fulfill its treaty obligations under the VCCR by ensuring the availability of habeas relief in state courts, because the VCCR does not require a federal habeas remedy for treaty violations if a state remedy is available. Therefore, this Court can avoid any conflict between the VCCR and federal habeas law by ruling that state procedural default rules must yield to the treaty in cases where application of such state rules would contravene Article 36(2).

CONCLUSION

For the reasons noted above, this Court should hold that every individual who has been harmed by a violation of his primary rights under Article 36(1) of the VCCR is entitled to a judicial remedy for that violation, except insofar as congressional amendments to the federal habeas statute enacted after ratification of the VCCR limit the availability of federal habeas relief. Additionally, Article 36(2) of the VCCR requires state courts in Virginia to provide review and reconsideration of Mr. Bustillo's case, and state courts may not apply procedural default rules to bar the judicial review required by the treaty.

Respectfully submitted.

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* Institutional affiliations are provided solely for purposes of identification, and do not imply institutional endorsement of the substantive views presented in this brief.

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IN THE
Supreme Court of the United States

MARIO BUSTILLO,

Petitioner,

v.

GENE JOHNSON,
Director, Virginia Department of Corrections,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF VIRGINIA

BRIEF *AMICI CURIAE* OF THE MID-ATLANTIC INNOCENCE PROJECT AND THE NATIONAL LATINO PEACE OFFICERS ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTERESTS OF AMICI CURIAE[1]

This brief is respectfully submitted in support of Petitioner by the Mid-Atlantic Innocence Project and the National Latino Peace Officers Association.

The Mid-Atlantic Innocence Project is a non-profit legal, educational, and advocacy organization dedicated to the exoneration and release of persons who have been convicted in Maryland, Virginia, or the District of Columbia of crimes that they did not commit. In furtherance of its mission, the organization provides pro bono investigative and legal assistance through a network of attorneys and law students to those prisoners whose innocence can be proved by DNA testing or other evidence. Additionally, the Mid-Atlantic Innocence Project advocates the adoption of rules and procedures that most effectively enhance our criminal justice system's truth-finding function.

Earlier this year the Mid-Atlantic Innocence Project coauthored a report entitled *A Vision for Justice: Report and Recommendations Regarding Wrongful Convictions in the Commonwealth of Virginia*. This report closely analyzed eleven known wrongful convictions of rape and/or murder in Virginia between 1982 and 1990 and identified a number of factors that significantly contribute to the risk of wrongful convictions. Among the factors identified were defense counsel's failure to obtain exculpatory evidence and the

1. No counsel for either party authored this brief in whole or in part; and no person or entity, other than the Mid-Atlantic Innocence Project, the National Latino Peace Officers Association, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief. Petitioner and Respondent have each consented in writing to the filing of this brief.

phenomenon of false confessions, factors that, as discussed below, can be implicated by the denial of consular notification.

The National Latino Peace Officers Association, a non-profit organization, is the largest Latino law enforcement organization in the United States, with over 75 chapters across the United States, including Puerto Rico. Its membership includes federal, state, and local peace officers from around the country. The Association's mission includes the elimination of prejudice and discrimination in the criminal justice system as well as the training of peace officers to qualify them for promotion, and among its core values is the promotion of professionalism in law enforcement.

Both the Mid-Atlantic Innocence Project and the National Latino Peace Officers Association believe that the pursuit and discovery of truth not only help ensure that innocent persons will not suffer wrongful conviction, but also that such pursuit and discovery benefit the public welfare by locating those persons who are actually responsible for crime. Both organizations believe that this case presents a compelling example of how recognition of an individual right to consular notification on the part of foreign nationals detained within the United States would improve and enhance the truth-finding abilities of the criminal courts.

SUMMARY OF ARGUMENT

Both the federal and the state criminal justice systems hinge on the discovery of truth. Courts cannot accurately ascertain the innocence or guilt of individuals unless there is a reliable and comprehensive fact-finding process. When crucial evidence goes undiscovered, unintroduced, and unconsidered during a criminal trial, the determination of innocence or guilt is hobbled. This works an injustice not only on the individual on trial, but also on society as a whole, which has an overwhelming interest in both the freedom of the innocent and the punishment of the guilty.

Petitioner Mario Bustillo sits in prison for a crime he almost surely did not commit because the truth-finding process in his case was woefully incomplete. Competent evidence developed after Bustillo's conviction strongly suggests that the course of his trial would have been dramatically altered had the Commonwealth of Virginia simply informed Bustillo of his right under the Vienna Convention on Consular Relations to contact his home country's consulate. Had Bustillo been notified of this right, compelling evidence that another man committed the crime for which Bustillo was convicted would have been discovered and could have been used by law enforcement officials investigating the crime, as well as by prosecution and defense attorneys. This case clearly illustrates the prejudice that can accrue to foreign nationals who are not informed of their right to contact their home country's consulate.

More broadly, consular officers can serve as an essential safeguard against the conviction of innocent persons both by providing a "cultural bridge" to foreign nationals who face criminal charges and by providing substantial assistance

in the fact-finding process. In particular, they can help law enforcement officials, prosecutors, and defense attorneys avoid misunderstandings common in intercultural communications, help reduce the number of foreign nationals who falsely confess to crimes they did not commit, and procure evidence from the suspect's country of origin or from the relevant community of foreign nationals living in the United States.

Many countries, including the United States, recognize the unique disadvantages faced by individuals suspected of crimes in a foreign country, and, when properly notified, provide assistance to their own nationals faced with criminal charges abroad. The benefits of consular involvement were clearly envisioned by the countries that entered into the Vienna Convention.

For all of these reasons, this Court should recognize foreign nationals' individual right to be notified that they can contact their consul when detained in the United States.

ARGUMENT

I. FACTS SUPPORTING BUSTILLO'S STRONG CLAIM OF ACTUAL INNOCENCE WOULD HAVE COME TO LIGHT HAD HE BEEN NOTIFIED OF HIS RIGHT TO CONTACT THE HONDURAN CONSULATE.

There is overwhelming evidence that another man committed the crime for which Mario Bustillo is currently incarcerated. Furthermore, it is highly likely that this evidence would have been uncovered had the Commonwealth of Virginia fulfilled its obligation under Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77 [hereinafter Vienna Convention], to inform Bustillo of his right to contact his country's consulate.

Petitioner Bustillo, a Honduran national, was arrested in the Commonwealth of Virginia on suspicion of the murder of James Merry. Merry was struck in the head with a baseball bat outside a restaurant in Springfield, Virginia on December 10, 1997, and he died several days later. Bustillo argued at trial that Merry was killed by another Honduran national — a man known to Bustillo only as "Sirena." Bustillo's claim of innocence was supported by the testimony of two eyewitnesses who stated that Bustillo did not deliver the blow that killed Merry. One of these eyewitnesses specifically identified Sirena as the man who struck and killed Merry. 3/18/98 Tr. at 141-142; 100-101. A third witness testified that she saw Sirena on a specified flight to Honduras the day after Merry died. *Id.* at 167-168. Bustillo and his counsel at the time of trial could not locate Sirena and did not know Sirena's real name.

Separately, the police possessed reports revealing that one "Julio C. Osorto" — the man whom Bustillo knew only as Sirena — was stopped near the murder scene and questioned by Officer Christopher Mahoney just hours after the crime. Report of Officer Christopher Mahoney, Dec. 10, 1997, at 1, J.A. 134. In addition, the investigation notes of another police official, Detective Richard Cline, specifically refer to "Julio-Sirena." Notes of Det. Richard Cline, Dec. 18, 1997, at 1. Although the police and prosecution were unaware of the connection between "Sirena-Julio" and Julio Osorto, 03/18/98 Tr. at 70, the Circuit Court of Fairfax County later held that "[t]he Commonwealth should have known, given the contents of the investigative notes and the police report, that 'Sirena-Julio' and Julio Osorto might be one and the same person[,] . . . especially given the defense's insistence that 'Sirena'/'Julio' was the assailant." J.A. 146.

Put differently, if they had had more information concerning the true identity of Sirena, the police could have conducted a much more thorough investigation, and they could have made sense of those pieces of the puzzle that they already had but that they thought were irrelevant. For example, had they made the connection between Sirena and Osorto, the police surely would have been more interested in the red stains that Officer Mahoney observed on Osorto's clothing and would have ascribed greater significance to the inconsistencies in Osorto's conflicting stories concerning his whereabouts that night.

The defense, too, could have helped solve the murder by connecting the dots. Had Bustillo's attorney known Sirena's real name, he could have requested, under *Brady v. Maryland*, 373 U.S. 83 (1963), any police reports or notes concerning Osorto, and on receiving the report and notes described above, he could have explained to the police, in the unlikely event that they were not already hot on the trail, that they should investigate the possibility that Osorto was the murderer. In this fashion, the pursuit of the truth would have been dramatically enhanced.

At trial the prosecution questioned the existence of "this so called Sirena" and called Sirena's absence "very convenient," J.A. 21-22. Moreover, crucial exculpatory evidence — unavailable to the defense at the time — was not introduced. Left to deliberate based on an incomplete factual record, the jury found Bustillo guilty, and he was sentenced to thirty years in prison. 3/20/98 Tr. at 24.

At no time was Bustillo informed that, as a foreign national, he had a right to contact the consulate of his home country, Honduras. This failure crippled the investigations of law enforcement, the prosecution, and the defense, and irrevocably damaged the trial's truth-finding process.

Bustillo has sworn that he would have contacted the Honduran consulate if he had been notified of his rights. J.A. 60. The Honduran government has indicated that, had Bustillo contacted the Honduran consulate, it would have provided him with biographical data concerning Osorto/ Sirena, a photograph of him, and official documents confirming that he entered Honduras just following the murder on the very flight attested to by the defense witness. J.A. 73-74. Honduras has further indicated that it would have attempted to locate and interview Osorto. J.A. 32. Considering that Bustillo's habeas attorney was able to secure a surreptitiously videotaped recording of Osorto, in Honduras, confessing in graphic detail to the murder of Merry, it is very likely that the government of Honduras would have been able to uncover facts related to Osorto's involvement in the murder. J.A. 39-40.

At a minimum, the involvement of the Honduran consulate would thus have enlightened *both the prosecution and the defense* concerning the following: (1) that the real name of the man called "Sirena" was Julio Osorto; (2) that a photograph of Osorto was available to show witnesses for identification; and (3) that, consistent with the testimony of a defense trial witness, Osorto had returned to Honduras almost immediately after Merry's death.